90-948

Supreme Court, U.S.
FILED
DEC 12 1990
JOSEPH F. SPANIOL, JR.
CLERK

No._____

IN THE

Supreme Court of the United States

OCTOBER TERM, 1990

CHARLES C. MCCARTHY,
Petitioner,

vs.

LOTT MAYO PRINCE, JR.,
Respondent.

ON PETITION FOR WRIT OF CERTIORARI
TO THE CALIFORNIA COURT OF APPEAL

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED FOR REVIEW

In refusing to enforce a valid and final civil money judgment rendered in Hawaii, which was neither paid nor otherwise discharged, the California Court of Appeal held that it did not do so because of certain *post Hawaii judgment* acts of the judgment creditor's assignee, petitioner herein, which established, for that court 1) that he was guilty of "misconduct" and 2) because of such conduct "the judgment could not be enforced in its entirety in Hawaii." The following important questions for review are thus presented:

1. Is the post judgment "misconduct" of a party seeking to enforce a sister state judgment in another state a separate and independent constitutional defense under the full faith and credit clause of the United States Constitution? What kinds of "misconduct" constitute that defense? Is it the law of the state of rendition of the judgment, or the law of the state of enforcement of the judgment which defines that "misconduct"?

2. As to a valid and final money judgment rendered in a sister state, here Hawaii, what *post judgment facts*, other than payment or other discharge, would make that *judgment not enforceable in the state of rendition* that would also constitute a constitutionally permissible defense to a civil action brought in California to enforce the Hawaii judgment?

3. Is the continued enforceability of a sister state judgment to be determined by the law of the state rendering the judgment, here Hawaii, or by the law of the state of enforcement, here California?

4. To what extent is the court in the state of enforcement of a sister state judgment permitted to impose under the full faith and credit clause of the Constitution of the United States its own ideas of law and policy and present them as the "construction" of the law of the state which rendered the judgment?

5. Is the state of enforcement of a sister state judgment free to use and fashion its own substantive law of assignment of judgments, extinguishment of judgments, contribution, etc., or has that body of law become constitutionalized and uniform regarding enforcement of sister state judgments under the full faith and credit clause?

6. To what extent ought the Supreme Court of the United States redetermine the facts underlying legal conclusions and the legal conclusions themselves, when they determine the applicability of constitutional issues? For example, in this case the conclusion of the state court below that petitioner and respondent were partners, which conclusion petitioner contends is wrong.

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PETITION FOR WRIT OF CERTIORARI

Charles McCarthy ("McCarthy") respectfully petitions for a writ of certiorari to review the judgment of the Court of Appeal of California in this case.

OPINION BELOW

The opinion of the Court of Appeal of California is unreported. [App., *infra*, B1-B19.]

JURISDICTION

The jurisdiction of this Court is invoked under 28 U.S.C. Section 1257(a).

The judgment of the Court of Appeal of California was filed June 15, 1990. [App., *infra*, B1.] In this case the California Court of Appeal is the highest court of California in which a decision could be had and its opinion in this case is a final judgment. A timely petition for discretionary review in the Supreme Court of California was denied on September 12, 1990. [App., *infra*, C1.]

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

1. Article IV, Section 1, of the United States Constitution provides in relevant part:

"Full Faith and Credit shall be given in each State to the public Acts, Records and judicial Proceedings of every other State."

2. Congressional legislation under the full faith and credit clause, so far as it is pertinent to adjudication thereunder, is embraced in 28 U.S.C. §§ 1738-1739.

STATEMENT OF THE CASE

A. THE PARTIES

Petitioner is Charles C. McCarthy ("petitioner" or "McCarthy").

Respondent is Lott Mayo Prince, Jr. ("respondent" or "Prince").

B. PRE HAWAII JUDGMENT FACTS

1. In 1969 McCarthy and Prince became general partners of Onouli-Kona Land Co., a California limited partnership ("Onouli"). In 1969 Onouli purchased 300 acres of raw land on the Kona Coast of the Island of Hawaii. In furtherance of that purchase, Onouli, McCarthy and Prince as general partners, signed a purchase money promissory note and deed of trust dated December 22, 1969. Pursuant to Hawaii law and the terms of the note and trust deed, Onouli, McCarthy and Prince were jointly and severally liable for any

deficiency judgment that might be rendered against them in Hawaii. (C.T. pp. 77-78, 100.)[1]

2. In April 1983 the holders of the note and trust deed, Estate of Richards, et al., commenced a foreclosure action on the note and trust deed against Onouli, McCarthy and Prince, all as co-defendants. (C.T. p. 78.) That action was commenced in the Hawaii Circuit Court, Third Circuit, State of Hawaii, Civil Case No. 8719.

3. Because Prince had abandoned his duties as a general partner in Onouli since 1976, McCarthy commenced a separate action in Los Angeles County Superior Court of California, Case No. WEC 57967, to have Prince removed as a general partner from Onouli and for other relief. (C.T. p. 101.) On September 6, 1983, a judgment was rendered in that action removing Prince as a general partner and reducing his interest in Onouli to that of a limited partner, leaving McCarthy as the sole general partner of Onouli. (C.T. p. 101.)

C. THE HAWAII JUDGMENT

On September 24, 1984, a money judgment was rendered in the Hawaii Circuit Court, Third Circuit, State of Hawaii, Civil Case No. 8719, in favor of

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[1] The Clerk's Transcript ("C.T.") is a single bound volume containing all of the court papers that make up the official record of the pleadings, etc., in the Orange County Superior Court of California and constitutes the record before the California Court of Appeal.

plaintiffs, The Estate of Hubert F. Richards, et al., and against defendants, Charles C. McCarthy, L.M. Prince, Jr., aka Jack Prince, and Onouli-Kona Land Co., a California limited partnership (herein "Onouli"), jointly and severally, for $2,242,988. (C.T. pp. 5-6.)

D. POST HAWAII JUDGMENT FACTS

1. In February 1985 all partnership property of Onouli was sold in order to partially satisfy the Hawaii foreclosure judgment dated September 24, 1984 (C.T. p. 78), leaving a deficiency owing thereon of $1,121,588. (C.T. p. 28.)

2. On April 28, 1987, Prince died, leaving a will naming his wife, Martha H. Prince, as executrix. (C.T. p. 30.) However, no probate action was commenced after his death because of his wife's claim that her husband's assets did not exceed $60,000. (C.T. p. 30.)

3. On October 3, 1987, Martha H. Prince, wife of defendant, signed a declaration under oath for transfer of all of her husband's property to her without probate stating that at the time of his death, i.e, April 28, 1987, the value of all of his California property did not exceed $60,000, while specifically stating that at that time he owned an interest in two California limited partnerships: Kau-Kona Land Company and Pua-Puaa Land Company. No mention is made by her in that declaration that Prince also owned an interest in Onouli, the third judgment co-debtor in the Hawaii judgment described above. (C.T. pp. 86-87.)

4. In July 1988 McCarthy paid $600,000 for the Hawaii judgment and took *an assignment of it* from the judgment creditors, Estate of Richards, et al. (C.T. p. 78.)

5. On September 14, 1988, because no probate proceedings had been initiated following Prince's death on April 28, 1987, and in order to protect his rights as a creditor of Prince's estate, McCarthy filed a petition for probate in the Orange County Superior Court of California, Case No. 144975. (C.T. pp. 79, 81-94.) Orange County, California, was the county that Mr. and Mrs. Prince resided in at the time of his death.

6. On October 5, 1988, Martha Prince also filed a petition for probate of her husband's will in the same probate proceeding commenced earlier that year by McCarthy, Orange County Superior Court of California, Case No. 144975. (C.T. pp. 30-31, 35-69.)

E. THE CALIFORNIA JUDGMENT

On September 13, 1988, McCarthy filed an application for entry of judgment based upon the Hawaii judgment in the Orange County Superior Court of California, Case No. 567847, pursuant to the procedure set forth in California Code of Civil Procedure sections 1710.10-1710.65, the California Sister State Money Judgments Act, based on the full faith and credit of the United States Constitution, which was enacted to facilitate enforcement of judgments granted outside California. (C.T. pp. 3-22.) The California judgment thus rendered is in the name of McCarthy as plaintiff and judgment creditor and Prince as defendant and

judgment debtor in the sum of $1,523,491. (C.T. p. 3.) The California judgment was entered September 13, 1988, which date of entry is endorsed on the face of the first page of the Hawaii judgment. [App., *infra*, A1.] Notice of entry of the California judgment was served on defendant on September 16, 1988. (C.T. p. 103.)

F. APPEAL TO THE CALIFORNIA COURT OF APPEAL

1. On October 14, 1988, Prince filed a notice of motion to vacate the entry of the California judgment based on the Hawaii judgment. On February 17, 1989, the Orange County Superior Court of California, law and motion Department 25, the Honorable William F. McDonald, judge presiding, denied defendant's motion. (C.T. p. 165.)

2. On March 13, 1989, Prince filed a notice of appeal from the order of the Orange County Superior Court denying his motion to vacate the California judgment based upon the Hawaii judgment. (C.T. p. 170.)

3. Following briefing and oral argument, the California Court of Appeal filed its opinion, not to be published, on June 15, 1990, holding that California was not required to enforce the Hawaii judgment under the full faith and credit clause of the United States Constitution because McCarthy was guilty of misconduct in that he breached his fiduciary duty by attempting to collect the entire judgment from the estate of his former partner and because the assigned judgment could not be enforced in its entirety in Hawaii. [App., *infra*, B8.]

REASONS FOR GRANTING THIS PETITION

I. *The Opinion of the California Court of Appeal conflicts with decisions of the Supreme Court of the United States.*

The California Court of Appeal (herein "the court below") stated and held that "misconduct" of McCarthy was the ground for denying to McCarthy enforcement of his Hawaii judgment. The "misconduct," said the court, lay in that McCarthy was a partner who paid a low price for an assignment of a judgment outstanding against himself and his partner Prince and then sought to enforce the judgment against his partner Prince. This, said the court, was a breach of fiduciary duty and violated the law and policy of the enforcement state, California. But violation of forum law or policy is not a valid ground under the full faith and credit clause, United States Constitution, Article IV, Section 1, and the decisions of this Court, for refusal to enforce a sister state judgment. (*Converse v. Hamilton* (1912) 224 U.S. 243 [32 S.Ct. 415]; *Kenney v. Supreme Lodge of the World* (1920) 252 U.S. 411 [40 S.Ct. 372]; *Fauntleroy v. Lum* (1908) 210 U.S. 230 [28 S.Ct. 641].)

In *Morris v. Jones* (1946) 329 U.S. 545 [67 S.Ct. 451], the court in Illinois issued an order staying all suits against the defendant. Plaintiff, in violation of that order, obtained a Missouri judgment against defendant. The United States Supreme Court held that the Illinois court must give full faith and credit to the Missouri judgment where plaintiff sued defendant on that judgment in Illinois. The contemptuous plaintiff in that case was in direct and strong violation of the Illinois

court itself, a far greater violation of Illinois dignity, law and policy than the so-called "misconduct" of petitioner in the case at bench. This court has pointed out that in the case of judgments for the payment of money, the exceptions to the full faith and credit clause are rare or nonexistent. (*Morris v. Jones, supra*, at 329 U.S. 545, 553 [67 S.Ct. 451]; *Magnolia Petroleum Co. v. Hunt* (1943) 320 U.S. 430, 438 [64 S.Ct. 208, 88].)

II. *The Issues in this Case are Important and Unsettled by this Court.*

There is *widespread, recurring, public cause for concern*, both in California and other states, for the stability and fluidity of commercial and personal life if sister state money judgments are not readily and predictably enforceable in a huge state such as California with its very large number of interstate transactions and large transitory population.

These *issues* are *unsettled* in this Court: (1) Is any form of "*misconduct*" a ground for denial of full faith and credit to a money judgment? (2) Are any *post judgment* facts, other than payment or discharge, relevant regarding full faith and credit for money judgments? (3) To what extent will this Court look behind an enforcement state court's: (a) "construction" of the law of the state rendering the judgment; (b) findings of fact and conclusions of law upon which the enforcement decision turns? (4) Regarding money judgments, to what extent must the enforcement state's law of assignment of judgments and contribution be constitutionalized?

No case or treatise has been found that discusses the effects, if any, of *post judgment facts* upon the

mandate of full faith and credit for sister state judgments.

III. *Summary of Errors of the California Court of Appeal.*

A. The use of "misconduct" undefined as a ground of defense to a sister state money judgment.

B. The effective use of its own newly minted "California" law and policy to defeat the enforcement of a Hawaii judgment by the device of *misconstruing* the "Hawaii" law of (1) the continued enforceability of a judgment; (2) assignment and extinction of judgments; and (3) partnership law and fiduciary obligations.

C. The court below was unclear regarding whether it was Hawaii law or California law which determines the continued enforceability of the Hawaii judgment in a California action to enforce that judgment.

D. Misstating and confusing both the Hawaii law and the pre-existing California law, with the effect of denying full faith and credit to the assignee plaintiff of the judgment. Both Hawaii law and pre-existing California law hold as follows: One co-debtor, jointly and severally liable on a judgment, can pay the judgment and take an *assignment* of the judgment and then enforce the judgment in the full amount of the judgment against the other co-debtor. If *he pays the judgment*, the other co-debtor can get *contribution* against the first co-debtor's share of obligation for the amount paid the other co-debtor. (See IV, *Legal Discussion, infra.*) But the court below erroneously held that the Hawaii

judgment was *paid* by petitioner and thereby the judgment was *satisfied and discharged* despite the express *assignment of the judgment* to petitioner. The court below then held that petitioner's action here, against respondent Prince was merely one for *contribution* to petitioner from respondent of one-half of the *amount which petitioner had paid* for the assignment of the judgment.

E. Erroneous characterization of the *facts* and the *law*, so as to label petitioner a *partner* with respondent at the time of the assignment of the judgment, despite the fact that they had not been partners for several years and the partnership had been terminated long before the assignment. At most, petitioner was a general partner and respondent a limited partner.

F. The erroneous conclusion that a general partner owes a fiduciary duty to a limited partner, where the law of Hawaii is clear that is not so but rather the duty is owed to the limited partnership.

G. The erroneous conclusion of law that a former partner of a terminated partnership, whether general or limited, cannot pay and take an assignment of a judgment outstanding against himself and his former partner.

IV. *Legal Discussion.*

A. The Court of Appeal's Decision Violated the United States Constitution Article IV, Section 1, Full Faith and Credit.

Under the full faith and credit clause of the United States Constitution, judgments of a state are required to have such full faith and credit given to them in every other court within the United States as they have by law or usage in the courts of the state from which they are taken. (*Magnolia Petroleum Co. v. Hunt* (1943) 320 U.S. 430 [64 S.Ct. 208].) Under the full faith and credit clause, local doctrines of res judicata become a part of national jurisprudence and are therefore *federal questions* cognizable before the United States Supreme Court. (*Durfee v. Duke* (1963) 375 U.S. 106 [84 S.Ct. 242].)

> "The full faith and credit clause is not to be applied, accordion-like, to accommodate our personal predilections.... It ordered submission by one state even to hostile policies reflected in the judgment of another state, because the practical operation of the federal system, which the constitution designed, demanded it." (*Estin v. Estin* (1948) 334 U.S. 541, 546 [68 S.Ct. 1213, 1217].)

In the case at bench it is Hawaii law, not California law or preferences or policy, that determines the effect and conclusiveness of the Hawaii judgment regarding later occurring facts. Professors Scoles and Hay, in their treatise on conflict of laws, put it this way:

> "The Judiciary Act of 1790 particularized that this language means 'the same full faith and credit as ... [the judicial proceedings] have by law or usage in the courts of such State ... *from which they are taken.*' This statement of policy is clear enough: conclusiveness and, with it, claim and issue preclusion are to be tested by 'the law and usage' of the jurisdiction which made the original determination." (Scoles and Hay, Conflict of Laws (Hornbook Series, 1982) § 24.2, p. 919.)

It is therefore to Hawaii law regarding judgments, assignment of judgments and partnership, not to California law thereon, that we must look to determine the effect and conclusiveness of the case at bench. And if there is no Hawaii law precluding the enforcement of the Hawaii judgment, that is the end of the matter. The Court of Appeal apparently believed that California law or "policy," newly declared in this case, should govern, applying, without saying so, the looser standards of choice of law rather than the strict hands off standards of review of a *judgment* and its effect.

In reviewing a judgment and its effect, the forum court, here California, has a very limited scope in imposing its own policy, limited to such things as modifiable decrees such as custody and support orders or violation of orders of the forum court itself. (*Kubon v. Kubon* (1958) 51 Cal.2d 229, 232 [331 P.2d 636].) There is no such ground as "misconduct" unless it be some extreme misconduct such as contempt of the forum court. The California Court of Appeal held that "misconduct" of the plaintiff judgment creditor occurring,

as it did here, after the Hawaii judgment is a defense to the enforcement of the Hawaii judgment in California. The Court so held despite the citation of no federal case so holding. The only authority for the "misconduct" defense are two earlier California Court of Appeal opinions that state that there is such a defense and cite as authority for that proposition only the report of the California Law Revision Commission writing its recommendation for the proposed legislative enactment of the Uniform Sister State Money Judgment Act, a procedural statute drafted to streamline the procedure for getting a sister state judgment made into a California judgment.

Violation of forum law or policy is simply not a ground to refuse enforcement of a judgment. (*Converse v. Hamilton* (1912) 224 U.S. 243 [32 S.Ct. 415].) The differing public policy or laws of the enforcing state, the forum, cannot contravene the full faith and credit clause of the United States Constitution. (*World Wide Imports, Inc. v. Bartel* (1983) 145 Cal.App.3d 1006 [193 Cal.Rptr. 830].) Full faith and credit requires that a money judgment of a sister state must be enforced and a California judgment based thereon must be enforced when entered pursuant to the California Sister State Money Judgments Act, California Code of Civil Procedure section 1710.25, even though it violates California policy. (*Silbrico Corp. v. Raanan* (1985) 170 Cal.App.3d 202 [216 Cal.Rptr. 201].)

B. Assignment of a Judgment to One Co-Debtor: One Co-Debtor, Jointly and Severally Liable on a Judgment, Can Pay the Judgment and Take an Assignment of the Judgment and then Enforce the Judgment in the Full Amount of the Judgment, Against the Other Co-Debtor. After Paying the Judgment, the Other Co-Debtor Can Get Contribution Against the First Co-Debtor for the First Co-Debtor's Share of the Amount Paid by Him.

The Court of Appeal's confusion lies in its failure or refusal to recognize: (a) that plaintiff here did not pay off and *discharge* and extinguish the judgment and then get a right of contribution against defendant for defendant's share of the *amount paid* by plaintiff to the creditor, but rather that (b) plaintiff paid for and took an assignment of the judgment and then brought the proceeding herein *on the judgment* under Code of Civil Procedure section 1710.10 et seq. to obtain a California judgment for the entire amount of the Hawaii judgment against defendant, as plaintiff had a right to do. Defendant would then have the right of contribution against plaintiff to recover plaintiff's share (here 50%) of the full $1,500,000 judgment paid by defendant, or effectively pay him $750,000 or one-half of that judgment.

The Court of Appeal confuses all of this by broadly suggesting throughout its opinion (and then basing the whole opinion upon that erroneous suggestion) that plaintiff had "extinguished a partnership debt" (Court of Appeal's opinion, footnote 1, p. 6); "discharged the judgment" (Court of Appeal's opinion, p. 8); "paid but a small portion of the judgment" (Court of Appeal's opinion, p. 9); "pays against or satisfies a judgment

(Court of Appeal's opinion, p. 9); speaking of McCarthy's "payment of the underlying judgment" (Court of Appeal's opinion bottom page 11 and top page 12) as if McCarthy had *paid off* the judgment rather than buying an assignment of it. The Court of Appeal further confuses things by treating plaintiff's application for a California judgment under its Sister State Money Judgment Act as being one for *contribution*, based on the amount paid by plaintiff to the judgment creditor, rather than as one based upon the *Hawaii judgment* and seeking a California judgment in the full amount of the Hawaii judgment.

Hawaii Law:

Hawaii law on the assignment of a judgment to one co-debtor is very scant.

There does not appear to be any case in Hawaii denying the right of a co-debtor, partner or otherwise, who are jointly and severally liable on a judgment, to pay the judgment creditor and take an assignment of the judgment and then enforce the entire judgment against the other co-debtor.

A Hawaii statute establishes that a nonnegotiable chose in action, e.g., a judgment, is assignable and that the assignee can maintain an action upon it, subject only to all equities existing in favor of the obligor and against *the assignor* at the time of the assignment or thereafter.

> "Assignee of a nonnegotiable chose in action, assigned in writing, may maintain thereon in the assignee's own name any action which, but for the assignment,

> might be maintained by the assignor; subject, however, to all equities and setoffs existing in favor of the party liable against the assignor and which existed at the time of the assignment or at any time thereafter until notice thereof was given to the party liable, except as otherwise provided." (Hawaii Revised Statutes, §634-1.)

Under Hawaii authority there is no reason not to presume in favor of the continued enforceability and complete effectiveness of the Hawaii judgment in the hands of the judgment creditor's assignee, petitioner herein.

Instead, the California Court of Appeal created baldly its own "Hawaii Law" (pages 8-9 of its opinion), starting with the bald assertion (top page 8), "Most important, Hawaii itself would not recognize an attempt by McCarthy to enforce the entire assigned judgment against Prince." The Court of Appeal cited *Silbrico Corp. v. Raanan, supra,* 170 Cal.App.3d 202, a California case which said nothing remotely like that. It stands for the opposite proposition, that the forum California court cannot substitute its own notions of policy to vacate a sister state judgment. Next, in the California Court of Appeal's opinion (page 8) comes the obvious truth contained in Hawaii Revised Statutes, section 633-2 et seq., stating that contribution from joint debtors, where one of them has discharged the judgment (not so in the case at bench) is expressly recognized in Hawaii. Next, in the California Court of Appeal's opinion, page 8, comes *Lou v. Valu-Bilt Homes, Ltd.* (1978) 59 Hawaii 283 [582 P.2d 195], a case wherein plaintiff neither paid off nor bought any judgment against co-obligators; the

case merely said that one joint venturer can get contribution against another joint venturer for advances made to the joint venture. The California Court of Appeal's opinion, page 8, then states the obvious, that under the Uniform Partnership Act, *partners* are fiduciaries and may not use their positions to gain a benefit *at the expense* of any other partner. But in the case at bench, (a) the parties were no longer partners, neither general partners nor was there a limited partnership at the time of the assignment; (b) plaintiff did not use any partnership asset, position or opportunity to purchase the assignment of the judgment; and (c) nothing that plaintiff did was at defendant's expense. Defendant Prince owed the same amount and had the same inchoate right of contribution both before and after the assignment of the judgment to plaintiff.

On page 8 of its opinion, the California Court of Appeal cites *Watermill v. Ettinger* (1952) 39 Hawaii 185, a case wherein the managing partner started a competing business, transferred partnership assets to his wife and lied outrageously to his partners, and no judgment was involved at all. The Hawaii court said, naturally, that these were breaches of good faith and trust. The Hawaii court also said that a partner owes a duty of trust during partnership liquidation, but in the case at bench the past partnership had already been liquidated and *terminated*; and that a partner may not make a profit for himself individually out of the partnership business, but at the case at bench plaintiff made no profit connected with the extinct partnership business at all. *Phillips v. Kula 200, Wick Realty* (1981) 2 Hawaii App. 206, is cited by the California Court of Appeal, in its opinion (page 8) as well as Hawaii Revised Statutes, section 425-121 (page 8, last line),

make the same obvious and irrelevant to the case at bench points.

After all this, the California Court of Appeal baldly states, in nonsequitur: "Attempting to collect an entire judgment from a partner, when the claiming partner paid but a small portion of that judgment, *is* such a benefit." Aside from the nonsequitur, plaintiff at bench was not a partner and did not pay, in the sense of discharge meant by the court; rather plaintiff here took an assignment.

The California Court of Appeal (opinion, page 9) cites Hawaii Revised Statutes section 425-118(a) regarding a partner's duty to contribute to losses sustained *by the partnership*. But in the case at bench there was no general or limited partnership at the time of the assignment; anyway, there was no partnership *loss* involved, the liability of the partnership remained unchanged as did the liability of Prince as a joint and severable obligor. The Court of Appeal's opinion goes on (page 9) to state that under the Hawaii statute, Prince had a duty to contribute to the partnership *debt* (i.e. the amount of the deficiency, $1,500,000, after the foreclosure sale); of course he did, he had a duty to contribute $750,000.

The Court of Appeal failed in its efforts to show that Hawaii law prevents McCarthy from enforcing his Hawaii judgment against the individually named defendant Prince. The California courts are under a United States constitutional duty and a California statutory duty to give full effect to the Hawaii judgment and to enforce it fully and totally which it has not done in the instant proceeding.

California Law:

In the leading treatise on California civil procedure, the author states the following on the assignment of judgments:

> "The remedy under C.C.P. 882 . . . is not exclusive. (C.C.P. 883(c).) A joint obligator or surety who pays the judgment in full may instead take an assignment of it from the judgment creditor. This is a purchase of the judgment, not a satisfaction of it; the judgment is kept alive and the assignee may enforce it by execution or other means to the extent necessary to recover from the other joint obligors or the principal. (See *Tompkins v. Powers* (1930) 106 C.A. 464, 466, 289 P. 685; *Sun Realty Co. v. Rosenstein* (1930) 107 C.A. 484, 487, 290 P. 1053; *Woolley v. Seijo* (1964) 224 C.A.2d 615, 622, 36 C.R. 762; 19 Cal. L. Rev. 196; cf. *Tucker v. Nicholson* (1938) 12 C.2d 427, 430, 84 P.2d 1045.)" (8 Witkin, Cal. Procedure (3d ed 1985), Enforcement of Judgment, Assignment of Judgment, §460, pp. 346-347.)

These cases stand for what Witkin says they do. *Williams v. Riehl* (1899) 127 Cal.365 [59 Pac. 762] is also squarely to that effect. These cases do not stand for and rather negate the misconstruction of them in the Court of Appeal's opinion (pages 6 and 7) discussing *Tucker, supra* and *Woolley, supra.*

The judgment creditor in that case assigned all of his right to the plaintiff assignee. The claim on the judgment against plaintiff assignee was merged in him, similar to a release of McCarthy in the case at bench. McCarthy cannot, of course, sue himself, but he, as assignee of the judgment, can sue the co-debtor Prince.

California Code of Civil Procedure section 1543 states:

> "A release of one of two or more joint debtors does not extinguish the obligations of any of the others, unless they are mere guarantors; nor does it affect their right to contribution from him or her, except as provided in section 877 of the Code of Civil Procedure."

C. **Partnership**

1. No Partnership of Any Kind Existed at the Time Plaintiff Herein Took the Assignment of the Judgment. Plaintiff, Therefore, Owed No Fiduciary Duty to Defendant.

In September 1983, five years prior to the assignment, a California judgment removed Prince as a general partner and reduced him to being a limited partner, with McCarthy, the sole remaining general partner of the limited partnership.

In February 1985 the sole asset of the limited partnership was a tract of land on the Kona Coast of Hawaii which was sold under the Hawaii judicial foreclosure judgment. That ended the partnership's only

asset and function and *terminated the limited partnership*. Prince's death in April 1987, with no business left to wind up, also dissolved and terminated the limited partnership.

A partner's fiduciary duty sometimes continues after dissolution, during wind up and liquidation, but not after termination; thereafter former partners may deal with each other at arms length. (*Wise Realty Co. v. Stewart* (1915) 169 Cal.176 [147 P. 463]; Reuschlein, The Law of Agency and Partnership (2d ed., 1990 Hornbook Series) section 188.)

2. A General Partner Owes a Fiduciary Duty to the Limited Partnership But Owes No Fiduciary Duty to a Limited Partner.

This is clearly and expressly the Hawaii law. (*Phillips v. Kula 200* (1983) 4 Haw.App. 350, 357 [667 P.2d 261].) *Phillips* was cited and quoted with approval by the Montana Supreme Court on that point is *Larson v. First Interstate Bank* (1990) 786 P.2d 1176, 1180.

So, even if erroneously, it should be believed or thought that there was still at least a limited partnership extant at the time of the assignment of the judgment to plaintiff herein, there was no fiduciary duty owed and therefore no "misconduct" or reason not to apply the regular assignment of judgment law to a co-debtor.

3. There Is No Law Denying to a Partner Co-Debtor the Right to Pay the Judgment, Take an Assignment of the Judgment and Enforce the Judgment Against His Co-Partner Co-Debtor.

Even in a currently existing partnership, partners may deal with each other and sue each other as individuals regarding matters not connected with the conduct of the partnership or its property. (See 7 Hawaii Revised Statutes, section 425-121, *Holmes v. Mello* (1903) 15 Haw.72; *Harrison v. Magoon*, 13 Haw.339, 351, *Blee v. Lead Mountain Mines* (1937) 8 Cal.2d 550 [66 P.2d 646].)

CONCLUSION

For the foregoing reasons, Petitioner respectfully requests the Court to grant this petition and issue a Writ of Certiorari to the Court of Appeal of California.

December 10, 1990

Respectfully submitted,

ALLAN F. GROSSMAN
15915 Ventura Boulevard
Suite 304
Encino, California 91436
(818) 990-8200

Attorney for Petitioner
Charles McCarthy

APPENDIX A

FILED

SEP 13 1988

GARY L. GRANVILLE,
County Clerk

By /S/ DEPUTY

RECORDATION
REQUSTED BY.

AFTER RECORDATION
RETURN TO.

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MAIL ( ) PICKUP ( )

Recorded October 2,
1984 in Liber 18184,
Page 544

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THIRD CIRCUIT COURT
STATE OF HAWAII
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Y. KITAMURA
CLERK

CARLSMITH, CARLSMITH,
WICHMAN AND CASE

ROBERT D. TRIANTOS 2549-0
DALE YAMADA ROSS 3273-0
P.O. Box 1720
Kailua-Kona, Hawaii 96745-1720

Telephone No. 329-6464

Attorneys for Plaintiffs

IN THE CIRCUIT COURT
OF THE THIRD CIRCUIT

STATE OF HAWAII

THE ESTATE OF HUBERT F. RICHARDS, by its Co-Personal Representatives, Elizabeth Alice Greenwell Richards and First Hawaiian Bank, ELIZABETH ALICE GREENWELL RICHARDS, individually, ROBERT NIGEL RICHARDS, TRUSTEE UNDER THE MARILYN SUE WILSON TRUST, and ROBERT NIGEL RICHARDS, TRUSTEE UNDER JOAN ELIZABETH COUPE TRUST, Plaintiffs, vs. CHARLES C. McCARTHY, L. M. PRINCE, JR., aka JACK PRINCE, NORMAN LEONARD GREENWELL, ONOULI-KONA LAND CO., a California limited partnership, JOHN DOES 1-50, JANE DOES 1-50, DOE CORPORATIONS, PARTNERSHIPS AND ENTITIES 1-50, Defendants.	CIVIL NO. 8719 (KONA) JUDGMENT

I hereby certify that this is a full, true and correct copy of the original on file in this office.

/S/
Clerk, Third Circuit Court, State of Hawaii

JUDGMENT

Pursuant to the Findings of Fact and Conclusions of Law filed herein, and pursuant to the Order Granting Summary Judgment filed herein on January 31, 1984, and the Affidavit re Fees, Costs and Interest, judgment is hereby entered in favor of Plaintiff above-named and against Defendants CHARLES C. McCARTHY, L. M. PRINCE, JR., aka Jack Prince, and ONOULI-KONA LAND CO., a California limited partnership, jointly and severally in the following amount:

AMOUNT CLAIMED BY PLAINTIFF	$1,610,050.00
INTEREST AS OF DECEMBER 30, 1982	490,954.00
ACCRUED PER DIEM INTEREST FROM DECEMBER 31, 1982 - JANUARY 31, 1984 @ $330.83	131,339.51
ATTORNEYS' FEES	8,760.50
COSTS	1,884.25
TOTAL JUDGMENT:	$2,242,988.26

As provided by Section 478-2, Hawaii Revised Statutes, interest at a rate of ten percent (10%) per annum shall be allowed commencing from February 1, 1984.

DATED: Capt. Cook, Hawaii, SEP 01 1984.

/S/ PAUL M. de SILVA, L.S.
JUDGE OF THE ABOVE-ENTITLED COURT

APPENDIX B

COURT OF APPEAL 4TH DIST., DIV.3
FILED

JUN 15 1990

Stephen M. Kelly Clerk
Deputy Clerk

NOT TO BE PUBLISHED

IN THE COURT OF APPEAL OF THE
STATE OF CALIFORNIA

FOURTH APPELLATE DISTRICT

DIVISION THREE

CHARLES C. McCARTHY,	)	G007912
	)	
	)	(Super.
Plaintiff and	)	Ct. No. 56
Respondent,	)	78 47)
	)	
v.	)	
	)	O P I N I O N
	)	
LOTT MAYO PRINCE, JR.,	)	
	)	
	)	
Defendant and	)	
Appellant.	)	
	)	
	)	

APPEAL from a judgment of the Superior Court of Orange County, William F. McDonald, Judge. Reversed and remanded.

Simon & Sheridan and Michael R. Rogers for Defendant and Appellant.

McCarthy & Bullis and William M. Bullis for Plaintiff and Respondent.

May a general partner, who is also joint debtor on a sister state judgment against the partnership, pay the creditor less than the full amount of the judgment, take assignment of the full judgment, domesticate it in California, and then enforce the entire judgment amount against the estate of his partner and joint debtor?

"To ask the question is to answer it." (Monterey S. P. Partnership v. W. L. Bangham, Inc. (1989) 49 Cal.3d 454, 464 (conc. opn. of Mosk, J.).) Accordingly, we find such partner is entitled to no more than a contribution toward the amount paid for the judgment.

I

Charles McCarthy and Lott Prince were the general partners of a California limited partnership when it defaulted on a purchase money promissory note and deed of trust executed by it in acquiring real property in Hawaii. A Hawaii judgment in the amount of $2,242,988.26, including attorney fees and interest, was entered on February 1, 1984. The partnership, McCarthy, and Prince were held jointly and severally liable on the judgment.

In February 1985, the property was sold at foreclosure for $1,350,000. The total due on the judgment after the proceeds had been credited was $892,988.26 plus accrued interest.

Prince died in April 1987. In July 1988, McCarthy paid $500,000 to the Hawaii creditor in return for assignment of the judgment. In September, McCarthy obtained entry of the sister state judgment in California. (Code Civ. Proc., § 1710.15) He named himself as creditor pursuant to the assignment, and Prince as the only judgment debtor. The amount entered was $1,523,491.33, compromised of $1,121,588.73 remaining on the original judgment plus fees and interest.

Contemporaneously, McCarthy filed a petition to initiate probate proceedings for Prince's estate. In October, Prince's surviving spouse moved to vacate the judgment. She also initiated probate proceedings and, on February 6, 1989, was named executrix.

McCarthy moved for an order charging several of Prince's partnership interests in other ventures of which McCarthy was the general partner; this motion was scheduled for hearing at the same time as the motion to vacate. When the court indicated its tentative decision was to deny both motions, McCarthy withdrew the charging request. Immediately afterward, however, McCarthy filed notice of a judgment lien with the California Secretary of State. (Code Civ. Proc., § 697.510, subd. (a).) The executrix appeals the denial of her motion to vacate the Hawaii judgment.

II

The Sister State Money Judgments Act (Code Civ. Proc., §§ 1710.10-1710.65), based on the full faith and credit clause of the United States Constitution, was enacted to facilitate enforcement of judgments granted outside California. "[A] judgment entered by one state must be recognized by another state if the state of rendition had jurisdiction over the parties and the subject matter and all interested parties were given reasonable notice and opportunity to be heard." (World Wide Imports, Inc. v. Bartel (1983) 145 Cal.App.3d 1006, 1010.) This "optional procedure [as opposed to the traditional action on the judgment] was intended to offer savings in time and money to both courts and judgment creditors, yet, at the same time, remain fair to the judgment debtor by affording him the opportunity to assert any defense that he could assert under the traditional procedure." (Tom Thumb Glove Co. v. Han (1978) 78 Cal.App.3d 1, 7.)

The entry itself is a ministerial act of the clerk of the court. (Code Civ. Proc., § 1710.25.) A number of grounds exist, however, for vacating a sister state judgment after it is entered. Code of Civil Procedure section 1710.40, subdivision (a), provides "[a] judgment entered pursuant to this chapter may be vacated on any ground which would be a defense to an action in this state on the sister state judgment, including the ground that the amount of interest accrued on the sister state judgment and included in the judgment entered pursuant to this chapter is incorrect."

"'In elaborating on the defenses available under section 1710.40, the Law Revision Committee makes the

following comment: "Common defenses to enforcement of a sister state judgment include the following: the judgment is not final and unconditional (where finality means that no further action by the court rendering the judgment is necessary to resolve the matter litigated); the judgment was obtained by extrinsic fraud; the judgment was rendered in excess of jurisdiction; the judgment is not enforceable in the state of rendition; the plaintiff is guilty of misconduct; the judgment has already been paid; [and] suit on the judgment is barred by the statute of limitations in the state where enforcement is sought." [Citations.]' [Citation.]" (Silbrico Corp. v. Raanan (1985) 170 Cal.App.3d 202, 207; see also World Wide Imports, Inc. v. Bartel, supra, 145 Cal.App.3d at 1009-1010.)

III

The executrix contends two of the above stated grounds are applicable: (1) the judgment was paid or satisfied, and therefore extinguished, and (2) McCarthy is guilty of misconduct because he breached his fiduciary duty by attempting to collect the entire judgment from the estate of his former partner. This latter contention, coupled with the fact the assigned judgment could not be enforced in its entirety in Hawaii, requires reversal.

There is no assertion that the underlying judgment is invalid. Hawaii had jurisdiction over the transaction and Prince had notice and an opportunity to be heard regarding the validity of the Hawaii creditor's claim. And, in fact, had the original judgment creditor sought to enter the judgment in California and enforce it against Prince, Prince's only recourse would have been offsets for any payments made and a cross-complaint

against his joint debtors. "California must, regardless of policy objections, recognize the judgment of another state as res judicata, and this is so even though the action or proceeding which resulted in the judgment could not have been brought under the law of policy of California." (World Wide Imports, Inc. v. Bartel, supra, 145 Cal.App.3d at p. 1011.)

It is the second stage of activity in this case, however, which causes the problem. The "creditor" who obtained entry of the sister state judgment is not only not the creditor named on the attached judgment, but is himself a named judgment debtor.[1] This does not, of course, mean his assigned judgment is useless; it serves as proof of the general partner's right to contribution. "The assignment may be taken in the name of the judgment debtor [but] the payment to the judgment creditor does not operate as a satisfaction of the judgment as between the debtor paying it and those jointly liable with him. [Citations.] The judgment is kept alive in equity to be used by the debtor paying to recover from his co-obligors the proportions they should pay. . . ." (Tucker v. Nicholson (1938) 12 Cal.2d 427, 430.)

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[1] The assignment itself is not at issue. Extinguishing a partnership debt, reduced to judgment, for less than one-half of the amount remaining due may well be commendable. Usually all of the named debtors profit from the action and pay their proportionate share. It is only the ensuing attempt, in this case, to take personal advantage of the situation which raises the specter of overreaching.

Both parties rely on Woolley v. Seijo (1964) 224 Cal.App.2d 615, albeit for different reasons. Woolley repeats the explanations in Tucker and then states the judgment debtor/assignee may not enforce the judgment in full, but is "limited in his recovery to an amount equal to [the codebtor's] proportionate share of that judgment." (Id. at p. 623.) McCarthy's reliance on Woolley to support his insistence Prince is liable for, at the very least, one-half of the entire amount remaining on the judgment is unfounded. The last three words quoted above, "of that judgment," were applicable because the paying debtor in Woolley paid the full amount of the judgment. Here, McCarthy paid considerably less than the face amount of the judgment; and, as discussed post, he acts in a fiduciary capacity in relation to Prince.

Most important, Hawaii itself would not recognize an attempt by McCarthy to enforce the entire assigned judgment against Prince. (See Silbrico Corp. v. Raanan, supra, 170 Cal.App.3d at 207.) Contribution from joint debtors, where one of them has discharged the judgment, is expressly recognized in Hawaii. (Hawaii Rev. Stat., § 633-12 et seq.; see also Lau v. Valu-Bilt Homes, Ltd. (1978) 59 Hawaii 283, 582 P.2d 195.) And, like California, Hawaii has adopted the Uniform Partnership Act (U.P.A.). Under general partnership principles, as stated in the U.P.A., partners are fiduciaries and may not use their positions to gain benefit at the expense of any other partner.

As observed in Watumull v. Ettinger (1952) 39 Hawaii 185, the relationship between partners requires the utmost good faith, to the extent of one becoming a trustee in relation to the other where a partnership is

being liquidated. And one partner may not make a profit for himself individually out of the partnership business. (Phillips v. Kula 200, Wick Realty, Inc. (1981) 2 Hawaii App.206, 629 P.2d 119, 123.) "Every partner must account to the partnership for any benefit, and hold as trustee for it any profits derived by the partner without the consent of the other partners from any transaction connected with the formation, conduct, or liquidation of the partnership or from any use by the partner of its property." (Hawaii Rev. Stat., § 425-121.) Attempting to collect an entire judgment from a partner, when the claiming partner paid but a small portion of that judgment, is such a benefit.

Further, "[e]ach partner. . .must contribute toward the losses, whether capital or otherwise, sustained by the partnership according to the partner's share in the profits." (Hawaii Rev. Stat., § 425-118, subd. (a).) On the face of this statute alone, Prince was only required to contribute to this debt, which amounted to a partnership loss (all partnership property having been sold in order to partially satisfy the judgment), in proportion to his share in the partnership.

McCarthy argues that because he took assignment of the debt instead of bringing an action for contribution, he is entitled to enforce the judgment itself against his partner. He is wrong. He cites no authority for, nor does he give any reason why his choice of remedy against his partner should confer such a benefit on him at the expense of his partner's estate. The various remedies available to a joint judgment debtor who pays against or satisfies a judgment are all designed to effectuate the same result. We clearly cannot

condone giving the assigned Hawaii judgment greater effect in California than in the state of rendition.

The court is empowered to enter judgment for the amount of contribution, if any, due McCarthy. Code of Civil Procedure section 1710.40, subdivision (c) permits vacating the entry of a sister state judgment in conjunction with the entry of "another and different judgment for the judgment creditor if the decision of the court is that the judgment creditor is entitled to such different judgment."

As to Prince's proportionate share, McCarthy now appears to agree it is fifty percent (although still incorrectly contending it is fifty percent of the entire amount due on the underlying judgment). The original judgment was imposed upon the debtors jointly and severally. McCarthy and Prince's estate "should, as between themselves, share the burden equally." (Young v. Rosenthal (1989) 212 Cal.App.3d 96, 130.) The assignee is not entitled to enter and enforce the entire underlying judgment against his partner's estate. Rather, he is entitled to use the judgment in equity to enforce his right to reimbursement from the estate, based solely upon the amount he paid to the judgment creditor.[2]

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[2] In an attachment to his petition to open probate for Prince, McCarthy acknowledges two limited partnership interests belonging to Prince, in both of which McCarthy is the general partner. There is a preliminary distribution due in one of those of $566,566.25 and an undisclosed amount in the second. McCarthy admits to holding both those interests; he insists the mere filing of his motion to charge those

IV

The executrix argues McCarthy's claim should have been presented in the pending probate proceeding. She maintains McCarthy was required to have first filed a creditor's claim (Prob. Code, § 9300) and only then to proceed to the sister state money judgment and the filing of a judgment lien.

A foreign judgment must be domesticated before it can be enforced. (Kahn v. Berman (1988) 198 Cal.App.3d 1499, 1507.) Having chosen this route, McCarthy did not need to file a formal creditor's claim in the estate. (Borba Farms, Inc. v. Acheson (1988) 197 Cal.App.3d 597.) "In situations where two or more parties are jointly liable on an obligation and one of them makes payment of more than his [or her] share, the one paying possesses a new obligation against the others for their proportionate share of what he [or she] has paid for them." (Id. at p. 602.) The contribution right arose, after Prince's death, upon McCarthy's payment to the creditor. When, and if, an amount is determined by the court on remand, payment may be requested from the estate without a formal claim. (Ibid.)

Judgment reversed. The matter is remanded to the trial court for a determination of the proportionate

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interests acts as a lien upon them and he has no duty to release them to the probate estate. This issue is not before us, but is certainly a matter which should concern the probate court. McCarthy reluctantly agreed at oral argument that Prince's partnership interests may be at least constructively a part of Prince's estate.

amount due from Prince's estate to McCarthy for his payment of the underlying judgment. Appellant to receive costs on appeal.

SONENSHINE, J.

WE CONCUR:

WALLIN, Acting P.J.

MOORE, J.

APPENDIX C

SUPREME COURT
FILED
SEP 12 1990
Robert Wandruff Clerk

DEPUTY

ORDER DENYING REVIEW

AFTER JUDGMENT BY THE COURT OF APPEAL

Fourth Appellate District, Division Three, No. G007912

S016708

IN THE SUPREME COURT
OF THE STATE OF CALIFORNIA

IN BANK

CHARLES C. MC CARTHY, Respondent

v.

LOTT MAYO PRINCE JR., Appellant

Respondent's petition for review DENIED.

Kennard
Acting Chief Justice